

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 3, 2005

ANGELA GATLIN ENGLAND v. PATRICK RALPH ENGLAND

Appeal from the Circuit Court for Hamilton County
No. 91 DR 0576 Samuel H. Payne, Judge

No. E2005-00382-COA-R3-CV - FILED NOVEMBER 22, 2005

This is a post-divorce case involving a modification of child support. At a hearing on April 22, 2003, the trial court ordered Ms. England to pay child support in the amount of \$775 per month. Mr. England filed a petition for contempt and at a hearing on August 31, 2004, the trial court determined that Ms. England was in arrears in the payment of her child support, but decreased Ms. England's child support to \$611 per month for the time period from April 22, 2003, through April 28, 2004, and to \$92 per week beginning April 29, 2004. Mr. England appealed. After careful review of the record and the applicable authorities, we reverse the trial court's decision reducing Ms. England's child support obligation from April 22, 2003 until the date of the hearing because it was a retroactive modification in violation of Tenn. Code Ann. § 36-5-101(a)(5) (Supp. 2004). We affirm the trial court's decision to modify Ms. England's child support obligation from and after the date of the modification hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Brian M. House, Ringgold, Georgia, for the Appellant, Patrick Ralph England.

Angela Gatlin England, Delray Beach, Florida, *pro se*, Appellee.

OPINION

I. Procedural and Factual Background

Mr. and Ms. England¹ were granted a divorce on May 24, 1991. Their marital dissolution agreement provided that they would have joint custody of their two children, ages 5 and 2, with Ms. England being the primary caretaker and Mr. England having liberal visitation privileges. Mr. England was required, among other things, to pay \$600 per month in child support and one-half the cost of Catholic private school tuition for the children.

On March 4, 1992, the parties entered into an agreed order of modification decreasing Mr. England's child support obligation to \$500 per month. On October 28, 1994, an agreed order was entered increasing Mr. England's child support obligation to \$628 per month.

On June 25, 2002, Mr. England filed a petition for a change of custody. Ms. England did not file an answer or appear at the hearing on April 22, 2003. The trial court, on May 12, 2003, entered an order which, among other things, transferred custody of the two minor children from Ms. England to Mr. England; set Ms. England's child support obligation in the amount of \$775 per month; and ordered Ms. England to be responsible for the education expenses of the children at Catholic schools.

Mr. England filed a petition for contempt on July 30, 2003, alleging that Ms. England had, among other things, failed to pay child support and private school tuition. Following a hearing on October 27, 2003, an order was entered by the trial court finding Ms. England's child support arrearage to be \$4,650 and her unpaid obligation for private school tuition to be \$3,424. The trial court ordered Ms. England to pay the obligation to the private school immediately and ordered her to continue paying child support in the amount of \$775 per month and an additional \$25 per month on the arrearage.

On May 3, 2004, Mr. England filed a second contempt petition alleging, among other things, that Ms. England had failed to pay child support as required by the previous order. Ms. England did not file an answer or other pleadings, but did apparently present proof at the hearing on August 31, 2004. On January 28, 2005, the trial court entered an order that provided in part the following:

... After hearing evidence in this matter and argument of counsel, the Court finds as follows:

¹ We note that Ms. England has remarried and changed her last name to "Sherrill," however, for purposes of this appeal we will refer to her as Ms. England.

1. That [Ms. England] was earning at the time of the hearing on April 22, 2003, in which the Court granted [Mr. England] custody of the parties' two (2) minor children, the sum of \$37,000.00 per year.
2. That [Ms. England] was earning at the time the oldest child. . . reached majority on April 29, 2004, the sum of \$500.00 per week for \$26,000.00 per year.
3. That [Ms. England] was earning at the time of this hearing the sum of \$540.00 per week or \$28,000.00 per year.
4. That [Ms. England] has failed to pay child support as ordered and owes the sum of \$6,244.29, calculated since the last contempt hearing of October 27, 2003 and giving credit for payments made on child support.

Therefore, it is

ORDERED, ADJUDGED AND DECREED:

1. That the prior ordered child support set at \$775.00 per month shall be modified retroactive to April 22, 2003 to \$141.00 per week or \$611.00 per month and that the parties shall be responsible for one half of the education expenses of the minor children through high school.
2. That current child support be modified based upon a change of circumstances in that [Ms. England's] income has decreased and there is now only one minor child, to \$92.00 per week and shall be retroactive to the date the oldest child turned eighteen (18) years old on April 29, 2004.
3. That [Ms. England] shall continue to pay the same amount, \$92.00 per week plus \$25.00 per month, when the support obligation ceases until such time as the total arrearage amount is paid in full.
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5. That a judgement be rendered against [Ms. England] in favor of [Mr. England] in the amount of \$6,244.20 which represents total child support arrearage payments.

II. Issues for Review

Mr. England appeals the order of the trial court and presents for our review three issues which we restate:

- 1) Whether the trial court erred in reducing Ms. England's child support obligation from April 22, 2003, to the date of the hearing on August 31, 2004.
- 2) Whether the trial court erred in modifying future child support in the absence of any pleadings filed by Ms. England seeking a reduction.
- 3) Whether the trial court's modification of Ms. England's child support obligation was supported by sufficient evidence.

III. Standard of Review

This is a non-jury case and, accordingly, our review is *de novo* upon the record of the trial court without any presumption of correctness attaching to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996) and Tenn. R. App. P. 13(d). We must, however, presume the trial court's factual findings to be correct absent evidence preponderating to the contrary. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

IV. Child Support Modification

Mr. England argues that the trial court's reduction of Ms. England's child support obligation from April 22, 2003 through the date of the hearing was a retroactive modification in violation of Tenn. Code Ann. § 36-5-101. Further, that because Ms. England did not file a petition to reduce her child support obligation, the trial court was without authority to modify the order. Finally, Mr. England argues that even if the trial court had the authority to modify the order, the evidence presented at the hearing did not support such a change.

Ms. England is representing herself in this matter. In a letter to the court, she argues that the trial court's order should be affirmed because it was fair and equitable, and she was deserving of the relief she was awarded.

A. Retroactive Modification

We first address the trial court's decision to modify Ms. England's child support obligation during the time period from April 22, 2003, through the date of the hearing on August 31, 2004. The record before this Court contains an order dated May 12, 2003, which transferred custody of the children to Mr. England, established Ms. England's child support obligation at \$775 per month and required her to pay private school educational expenses. Ms. England apparently did not comply with the order and by subsequent order entered on November 4, 2003, was found to be in arrears in the amount of \$4,650 in child support and \$3,424 in educational expenses. A petition for contempt was filed, and at the hearing on August 31, 2004, the trial court found Ms. England to be in arrears in her child support obligation and decreased Ms. England's child support from \$775 per month to \$611 per month from April 22, 2003 through April 28, 2004, and to \$92 per week beginning April 29, 2004. We agree with Mr. England that this constitutes a retroactive modification of a child support order in violation of Tenn. Code Ann. § 36-5-101(a)(5) (Supp. 2004), which states in pertinent part:

[a]ny order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. *Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed . . .*

(emphasis added).

The purpose of this statutory provision is to prohibit the retroactive modification of child support. *Sadler v. Sadler*, E2000-02110-COA-R3-CV, 2001 WL 775608, at *4, 2001 Tenn. App. LEXIS 481, at *11 (Tenn. Ct. App. E.S., filed July 11, 2001) *no appl. perm. filed*. A trial court has no power to alter a child support award as to any period of time occurring prior to the date on which an obligee spouse files his or her petition for modification. *Alexander v. Alexander*, 34 S.W.3d 456, 460 (Tenn. Ct. App. 2000). The trial court's order from the hearing on August 31, 2004 reduced Ms. England's child support obligation back to April 22, 2003- a total of 16 months. Tenn. Code Ann. § 36-5-101(a)(5) (Supp. 2004) prohibits a retroactive reduction in child support- that is, a reduction in child support prior to the date the petition for modification is filed. Although Ms. England did not file a written petition for modification, we presume she made an oral request for modification at the hearing on August 31, 2004 because the trial court heard proof on this issue. Under these circumstances, her child support obligation could not have been modified at any time prior to the hearing. Although we do not have a transcript or statement of the evidence from the hearing, it appears from the factual recitation in the trial court's order that Ms. England presented compelling testimony as to the need for a retroactive modification. Regardless of how compelling her plea, the trial court did not have the authority to grant Ms. England the relief she belatedly sought. Accordingly, we hold that the trial court erred in retroactively modifying Ms. England's child support obligation for the period of time from April 22, 2003 to the date of the hearing on August 31, 2004.

B. Prospective Modification

We now address the issue of whether the trial court erred in modifying Ms. England's child support obligation on August 31, 2004, absent a pleading filed by Ms. England requesting this relief. Based upon the record before us, we must affirm the decision of the trial court.

The record before this Court reflects that on May 3, 2004, Mr. England filed a petition for contempt alleging Ms. England's failure to pay child support. Ms. England did not file any pleadings. At the hearing on August 31, 2004, both parties appeared and the trial court heard proof on Ms. England's nonpayment of child support and the change in circumstances since the last hearing. The trial court made specific findings of fact in the order regarding Ms. England's decreased ability to pay child support and the attainment of the age of majority by one of the parties' children. In the absence of a transcript from the hearing or a statement of facts, we must conclude that the parties presented the issue of prospective modification of child support to the court based on the implied consent of the parties pursuant to Tenn. R. Civ. P. 15.02, which in pertinent part provides:

[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . .

The determination of whether there was implied consent for purposes of Tenn. R. Civ. P. 15.02 rests in the discretion of the trial judge, whose determination can be reversed only upon a finding of abuse of discretion. *Zack Cheek Bldrs., Inc. v. McLeod*, 597 S.W.2d 888, 891 (Tenn. 1980). We do not find any abuse of discretion in this case. Accordingly, we affirm the trial court's decision to set Ms. England's child support obligation at \$92 per week for the support of one minor child effective August 31, 2004.

C. Preponderance of Evidence

Mr. England's final issue, that the trial court's decision is not supported by the evidence, requires a careful review of the evidence presented at trial. Mr. England, as the appellant, had the primary responsibility of preparing and filing a factual record containing a full, accurate, and complete account of what transpired at trial with regard to the issues he planned to raise on appeal. Tenn. R. App. P. 24; *Davis v. Tennessean*, 83 S.W. 3d 125, 127 n.2 (Tenn. Ct. App. 2001); *McDonald v. Onoh*, 772 S.W. 2d 913, 914 (Tenn. Ct. App. 1989). When an appellant fails to provide a factual record on appeal, "we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Craft v. Forklift Sys., Inc.*, No. M2002-00040-COA-R3-CV, 2003 WL 2164276, at *2, 2003 Tenn. App. LEXIS 491 at *4 (Tenn. Ct. App. M.S., filed July 14, 2003) *no appl. perm. filed*. Because we must presume the trial court's factual findings to be correct absent evidence preponderating to the contrary, *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993), and given that there is no transcript

or statement of the evidence for us to review, we hold that the evidence does not preponderate against the findings of the trial court.

V. Conclusion

Ms. England's child support obligation from April 22, 2003 through August 30, 2004 remains at \$775 per month. Effective August 31, 2004, her child support obligation is \$92 per week. On remand, the trial court shall compute Ms. England's total child support arrearage plus statutory interest less credit for payments made by Ms. England. The trial court may allow Ms. England to make installment payments on the arrearage in an appropriate amount after giving due consideration to the amount of statutory interest that is accruing on the arrearage.

For the aforementioned reasons, the judgment of the trial court is affirmed in part and reversed in part. We remand the case to the trial court for proceedings consistent with this opinion. Exercising our discretion we tax the costs one-half to the Appellant, Mr. England, and one-half to the Appellee, Ms. England.

SHARON G. LEE, JUDGE